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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 374

UNITED ENTERPRISES, INC.,
Petitioner,

vs.

ANNE DUBEY, EVA A. LOWTHER, and LEE ORA BROWN, Being and Comprising the Members of the Florida State Board of Beauty Culture Examiners,
Respondents.

REPLY BRIEF.

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REPLY BRIEF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The petition for reply to the brief of the respondents in opposition to the petition for writ of certiorari herein, respectfully submits the following:

I.

The petition for writ of certiorari presents a federal question requiring that the Supreme Court of the United States invoke its jurisdiction to review this cause on writ of certiorari.

The respondents ask that this petition be denied on jurisdictional grounds, and state, without assigning fact or reason that petitioner fails to set forth a federal question within Rule 38, Part 5 of the United States Supreme Court Rules. This is a bare, unsupported statement upon the part of respondents, to which they add nothing, and without something to support such conclusion, the same virtually amounts to an admission that a federal question within said rule is here presented. This cause has since its inception, sought a declaratory judgment, declaring the Florida Beauty Culture Law inapplicable to its business as an improper exercise of the police power of the State of Florida, and if applicable, violative of Article 1, Section 8, Clause 3 of the Federal Constitution and the Fourteenth Amendment thereto. This Court in measuring its own jurisdiction necessarily must take into consideration the special and important reasons for the granting of the writ herein, namely the ever-increasing efforts upon the part of the State to establish state barriers, and the ever-increasing effort upon the part of the State to impose upon simple trades and professions, despite the interstate character of their business, arbitrary and unreasonable restrictions. In the instant case, the State of Florida, through the Florida Beauty Culture Law, has attempted to establish such a state barrier, and the State of Florida has attempted to impose upon the simple trade of a salesperson, despite the interstate character of such salesperson's business, arbitrary and unreasonable restrictions. Certainly there is by this petition presented as

question of gravity and importance, justifying the exercise of this Court's jurisdiction upon the within petition.

The petitioner comes definitely within Rule 38 of the United States Supreme Court, and particularly Part 5(c) thereof.

II.

The Circuit Court of Appeals for the Fifth Circuit erroneously affirmed the judgment and decision of the District Court for the Northern District of Florida on the merits of this cause of action.

Respondents discuss a number of cases cited by the petitioner in its original brief. Discussing their criticism of the cases upon which petitioner relies:

Respondents say that the case of *Baker* v. *Daly*, 15 Fed. 2nd 881, is not in point, as no question of the right to give demonstrations was involved. No criticism is made of the reasoning of this case, nor of the rules laid down, and of which this case is a precedent. The case is in point, and is a sound determination of the very question here involved. In this case, the District Court had before it for consideration the constitutionality of the cosmetic therapy law of Oregon as applied to a person who was expert only in the waving of a woman's hair, and earned his living that way. This court held that an arbitrary attempt to group unrelated callings or professions together and to require one to qualify to perform other techniques, such as manicuring, massage, etc. was an unreasonable imposition and interference with private business, and imposed undue and unnecessary restrictions upon a lawful occupation. This case is in point for the reason that the Florida statute in question attempts to impose upon one who desires to sell cosmetics by demonstrating same

through the application of a small quantity of cold cream to the face of another be expert in many unrelated techniques, such as the removal of superfluous hair, the straightening of hair, some 70 or more in all, all having no relation to the technique of applying cold cream to the face of another. The petition herein reiterates that the case of *Baker* v. *Daly* is authority for the statement "The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose undue and unnecessary restrictions upon lawful occupations." *The case of Baker* v. *Daly is identical to the case at bar. If in the opinion of the Court in that case the words "expert only in giving a demonstration facial" were substituted for the words "expert only in the waving of hair," it would be the case at bar.*

In leveling criticism at the case of *Hoff* v. *State* (Del.), 197 Atl. 75, cited by the petitioner, a curious comment appears in the brief of the respondents: "If the petitioner was urging the invalidity of the Florida Statute, the case of *Hoff* v. *State, supra,* might be relevant * * *" The respondents have lost sight of the prayer of petitioner's original complaint herein for a declaratory judgment in the District Court of Florida. Under petitioner's own statement, admittedly the case of *Hoff* v. *State, supra,* does hold that the educational requirements and those of age and apprenticeship had no relation whatever to the public health and safety, and therefore were beyond legislative fiat. Respondents fail to criticize this holding upon this account. It is upon this ground that the same is cited in support of the petition herein.

The criticism by respondents of *State* v. *Walker,* 48 Wash. 8, 92 P. 775, 15 Anno. Cases, 257, is that the case simply held that a State statute regulating the barber trade was valid insofar as it related to the public health

and safety. Regulations not designed to promote the public health and safety were declared to be beyond the State's police power. This is exactly the position taken by the petitioner in this cause of action. In the instant case, a regulation that a person, to be licensed to sell cosmetics by the methods described in the complaint, and in the agreed statement of facts, must have spent months of study and apprenticeship in unrelated subjects and techniques, all of which had no relation to any public health problem which might be involved in the transaction incident to the sale of cosmetics.

The respondents criticize the case of *Ex Parte Lucas,* 160 Mo. 218, 61 S. W. 218, and the case of *Schneider* v. *Duer* (Md.), 184 Atl. 914, and state that neither of these decisions are pertinent except in case of an attack upon the validity of the Florida statute. Most certainly petitioner is attacking the validity of the Florida statute as applied to its business, and these decisions are authority for the unquestioned rule that a statute enacted under the police power, must bear a reasonable relation to the health question sought to be corrected.

Upon page 16 of their brief, respondents make a statement which is hardly understandable, in view of the position taken throughout the course of this cause of action by the respondents, as is disclosed by the record. This statement is as follows:

> "Some of these decisions might be relevant if this was a case where petitioner was contending that it should be relieved of certain specified requirements of the act, claimed to be invalid. But, such is not the case. Petitioner does not offer to comply with provisions admitted to be reasonable. It says that its activities are entirely beyond the reach of any of the requirements. For instance, the act requires a beauty culturist to furnish a health certificate—a requirement

admitted to be proper by all of the authorities. Yet, petitioner's representatives decline to comply with this provision. So, the cases dealing merely with specific provisions of legislation of this character are not in point."

Petitioner has heretofore in this proceeding clearly stated its position in this respect. Petitioner does not claim, nor has it claimed that it is beyond the reach of a proper police regulation. Admittedly, there may be features about its business that would justify the State in imposing some regulation in the interests of the public health. Further, if the only requirement of this act was that petitioner's representatives be required to furnish health certificates, this cause would not have been instituted. But respondents, in making this assertion in their brief have failed to point out any way by which the petitioner could do business in the State of Florida by complying with such provision, and such provision alone. The respondents have made no effort in this cause of action to point the way for the petitioner to continue to do business in Florida by complying only with such provisions of the act which petitioner admits are reasonable. The fact remains that the respondents do not wish the petitioner to do business in Florida by a compliance with the reasonable provisions of this act, but respondents seek to impose upon petitioner all the unreasonable and all the arbitrary features of this act, which necessarily precludes petitioner from doing business in Florida. Under the facts disclosed by this case, how can petitioner's representatives continue to operate in Florida? By no other means than by securing a certificate of registration or a license. This means that petitioner must comply with every single arbitrary, unfair and unreasonable regulation in this entire act. The cases cited by petitioner are in point.

It must be borne in mind with reference to the above statement appearing in respondents' brief that this was an action for a declaratory judgment. If respondents were correct and even sincere in their suggestion that the petitioner could do business in Florida without complying with these arbitrary and unreasonable requirements, the decision of the District Court, sustained by the Circuit Court of Appeals is erroneous in failing to declare this to be the case. It is manifest that the District Court and the Circuit Court of Appeals in affirming the action of the District Court, failed to grasp the full significance of the Federal Declaratory Judgments Act (Judicial Code, Section 274 d, Amended; U. S. Code Annotated, Title 28, Section 400) and to thereby enter a declaratory judgment fully declaring the rights of the petitioner to do business in the State of Florida.

In discussing the case of *Board* v. *Gibbons* (Ala.), 193 Co. 116, the respondents attempt to make some distinction between the sales methods pursued, or the technique employed by the petitioner as is outlined in the complaint and as outlined in the agreed statement of facts filed by the parties herein. This distinction, although minor, does not have any bearing upon the real issue of this case. Under the provisions of the Florida Beauty Culture Law, no such distinction is made. The act is invoked in its full force, if one applies a portion of cold cream, however small, to the face of another. If a person performs such act upon the face of another, the Florida Beauty Culture Act requires that such person be licensed or registered to practice the profession of beauty culture, meaning that such a person must have complied with all these unreasonable provisions of this act which have been pointed out in petitioner's brief, upon the merits of this petition. Petitioner again asserts that if respondents are correct and sincere in this connection, the decision of the District Court

was erroneous for failing to enter a judgment broad enough to declare that in following the sales practices outlined in the complaint, petitioner was not subject to the arbitrary provisions of the Florida Act.

The petitioner earnestly contends that this distinction is not well taken. That under the Florida Act, petitioner would be equally subject to its arbitrary provisions doing the things outlined in the complaint the same as if doing the things outlined in the agreed statement of facts.

Respondents rely upon one single case, that of *Luzier Laboratories* v. *The Minnesota State Board* (Minn.), 248 N. W. 664. Against the decided weight of authority relied upon by the petitioner, this case stands out as the single contrary authority like a "sore thumb." The *Luzier* case is founded upon a false premise, namely, there was not an improper grouping of unrelated skills and professions involved. This case should not be accorded full weight to the disregard of the unanswerable authorities cited by the petitioner.

Passing to the further proposition urged by the respondents that the statute in question does not unreasonably burden interstate commerce, respondents seek to illustrate that the demonstrations herein involved are purely local transactions. *Is not one who is involved in a purely local transaction entitled to the protection afforded him by the Federal Constitution?* Is not the right of the individual to follow a useful trade or profession free from molestation under the false guise of a public health police regulation a right so inherent that the Supreme Court of the United States should protect it in a proper action? The transaction here involved is however, not purely local. It is a part and parcel of an interstate transaction, not separate and apart.

The illustrations put forward by the rsepondents do not hold water. The illustration that an automobile sales person, demonstrating an automobile to a prospective purchaser, would be free from securing a driver's license is not an illustration appropriate to the case at bar. But if the respondents, in making such an illustration, would have added a regulation that one to demonstrate automobiles for the purpose of sale must spend months in study and appenticeship, becoming proficient not only in driving, demonstrating and selling automobiles, but in all the varied branches of the automobile industry, the illustration would have served to show how untenable respondents' position really is. The respondents make a farfetched illustration about doctors and demonstration of surgical instruments. Permit petitioner to make an illustration in this respect. Some states license foot doctors, and call them podiatrists. How valid would a regulation be, requiring all shoe salesman to be licensed as podiatrists?

The Circuit Court of Appeals for the Fifth Circuit, in their written opinion, made this statement: "The regulatory provisions of the statute are appropriate to the attainmentof the legislative object, and are not arbitrary or unreasonable." The Court was applying a proper rule to the case, but mis-applied the facts. There is more to this Florida act than a mere requirement that an applicant, for a license, submit to a medical examination. We submit that the many varied requirements, such as an applicant being proficient and learned in the following subjects: Hair cutting, manicuring, hair-straightening, dyeing of hair, cleansing of toe-nails, permanent waving, removing superfluous hair, use of chemical heat devices, and many others, are not appropriate to any health problem involved or incident to petitioner's business of selling cosmetics in Florida. May it be said again that petitioner

would not, and does not object to submitting its sales persons to medical examination. Neither does petitioner question the high purpose which led to the enactment of this law, nor does petitioner wish to debate whether or not the law as applied to the practice of beauty culture in general, in all its varied aspects, is a reasonable or unreasonable regulation.

In determining the validity of this statute in question as applied to petitioner's business and sales practices in the State of Florida, the proper test to be applied is whether the regulation imposed upon petitioner's business is a reasonable regulation, having a reasonable relation to the health problem involved in connection with petitioner's said business, so sought to be regulated. This test, properly applied to the facts of the instant case, sustains the prayer of petitioner's original complaint that a declaratory judgment be entered in this cause, fully declaring the rights and limitations of the petitioner to do business in the State of Florida.

The petitioner respectfully renews its request that the Supreme Court of the United States enter a writ of certiorari herein to the Circuit Court of Appeals for the Fifth Circuit, to the end that this cause may be reversed.

Respectfully submitted,

UNITED ENTERPRISES, INC.,
Petitioner.

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ELMER Q. LOCKYEAR,
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Dated at Evansville, Indiana, this 13th day of October, 1942.